under its control. It may double the tax on corporations, and proportionally exempt individuals. It may increase corporate burdens for the reason that aid has been afforded to the United States. Such a power is far more susceptible of abuse than a state tax on United States securities. In that case, no unfriendly discrimination against them would be tolerated, while in the present case, under the mask of friendship, a deadly stab may be given to national credit. It is no answer to say that this will not be done; the fact that it may be done, is a strong argument against the existence of the power.

T. W. D.

LEGAL MISCELLANY.

CAPITAL HINTS IN CAPITAL CASES.

BY DAVID PAUL BROWN.

Firmness and decision are as necessary as knowledge and talent; the heart can do almost as well without the head, as the head without the heart. There can be no cold-blooded defence. An appropriate and becoming manner is scarcely less necessary than appropriate and becoming matter. A judicious and clear development of the facts of a case is as important as the ablest and most eloquent argument. In a doubtful case, a skilful examination alone may secure a verdict; but the best argument, without such an examination, will generally result in a failure. An artist cannot paint without his colors; and the facts derived from the testimony, are the colors or materials for the speech.

There is what may be called an argumentative cross-examination, which exhibits to the jury the reasoning of the counsel, in immediate, direct connection with the evidence of the witness. For instance, suppose the following cross-examination of a witness:

Have you had any dispute or difference with the defendant? No. Have you been upon friendly terms with him for many years?

[1] The following hints, now revised and extended by their author, will commend themselves to the bar, no less by their intrinsic merits than by their authority, as the mature advice of a gentleman, who in a practice of nearly half a century, has enjoyed eminent success in the most important criminal cases.—Eds. Law Reg.

Yes. Have you been under obligations to him? Yes. Well, then, having had no difference, but being for a long time upon friendly terms, and being also under obligation and bound in gratitude to him, how did it happen that you were so vigilant and active in your efforts for his detection and conviction?

An examination of this character can scarcely fail justly to produce most unfavorable impressions of the witness.

Again, it is sometimes judicious to compel him to exhibit his own unworthiness of belief, by bringing before him direct and unequivocal contradictions in his testimony, and then asking him to explain and reconcile them if he can. I have seen a witness struck dumb by this mode of cross-examination; and, in many cases, it is much better thus to present it, than to reserve the contradiction for after discussion; it is fresher, fairer, more candid, and more efficient.

Before you venture upon the trial of a capital case, be well assured in your own mind that you are competent for the hazardous duty you are about to assume. Remember the blood of the defendant may be upon you if your task be feebly performed, and do not, therefore, allow a feverish desire for *premature* notoriety, in a case of great popular excitement, to blind you to the difficulties and dangers by which you will be inevitably surrounded. The trumpet of fame cannot drown the small still voice of remorse.

Being well assured that you are able in point of intellect and knowledge, be equally well convinced that your feelings are deeply enlisted for the hapless being you are called upon to defend, and that these feelings, instead of impairing your efforts, will contribute to strengthen and enforce them. You should feel as though you were defending yourself, which you will naturally do by constantly holding in view the life of the prisoner, the gibbet, and his forlorn and heart-stricken survivors.

You must know no *fear* but that of *failure*, and even *that*, you must permit nobody else to discover through you. Waive no right that you possess that may affect the defendant—yield tribute to no authority that is illegitimately exerted to his injury—recollect you guard the citadel of human life—be wary, and be firm. The

judge and the jury, it is true, may *take* the life of the prisoner, but you are not to *give* it away. They must reach it over your own prostrate body.

In all you think, and say, and do, remember *your* strength is nothing. There is but *one* arm that is powerful to save, and in relying upon that arm, you derive a support, the mere consciousness of which is both a sword and shield in the hour of extremest peril. You may not acquit the guilty; nay, you may not acquit the innocent; but you will at least, by a firm, faithful, and fearless discharge of your duty, *acquit yourself!*

I have said that manner is scarcely less necessary than matter—indeed, rightly considered, it *is* matter.

You must enter upon the trial of a capital case as a physician should enter the death-bed scene—calmly, gravely, solemnly—all eyes are upon you—all *hopes* are upon you—all *fears* are upon you.—There is no time for flippancy, agitation, or irresolution—much less for smiles or merriment. Sport would as well become a charnel-house.

Stand by the prisoner while he makes his challenges; advise with him, comfort him, and sustain him. When you repeat his challenges, do it in a mild and inoffensive way, lest you may create *enemies*, while your chief object is to secure *friends*.

If you ever challenge for cause, and the challenge fail, be certain that you have not exhausted your right to peremptory challenge, and invariably exercise it.

Never challenge the twelfth juror, unless you are reasonably certain that he who may be called in his place, will be more favorable to the prisoner.

The jury being complete, deliberately proceed to the trial of the cause. I say deliberately—no hurry—no confusion—no gossip—no levity—no divided attention—note everything with the "very comment of your soul;" and while *you* look at all, bear in mind the prisoner, and *all* connected with him, look at *you*.

If the unhappy man have a family, much as it may cost, the family should be present in the hour of his extremest need. He

will suffer more, and they will suffer more, by their absence. Their presence gives a proper tone and complexion to the awful scene. It is worth a thousand fancy sketches of domestic, parental, conjugal, or filial agony. When the verdict shall be returned, take your post by the prisoner, calm, collected, prepared for, and *equal to* either fortune.

If your efforts should be crowned with success, be grateful to that power which controls all things, but exhibit no vain spirit of triumph. If the defendant be convicted, nerve yourself to receive and bear the blow, and do not despair, much still remains to be done.

After a verdict of guilty, if you doubt the sufficiency of the evidence, or charge of the court, or the decision of the judge upon the points of law, or fairness of the jury, move for a new trial.

If none of these grounds *exist*, or if you should urge them *unsuccessfully*, enter a motion in arrest of judgment, provided there is any actual or supposed error upon the face of the record.

If this effort should also fail, the next awful step will be the judgment. Here, too, you must be present, and when the judge inquires of the prisoner what he has to say why sentence of death should not be pronounced against him, if there be any such reason, be careful that it be supplied.

The sentence having been passed, the death-warrant issues—your application for a pardon has been refused—the drop falls—and then, and not till then, your duties are done.

To conclude, the condition of an advocate for a defendant in a capital case may be aptly compared to that of a commander of a ship in a storm: the cordage snaps, the masts go by the board, the bulwarks are carried away—her hull springs a leak—every dependence, from time to time, fails, and ruin appears to be inevitable: but still, amidst the "wreck of matter," sustained by the immortal mind, with a resolved will, the gallant commander stands by his helm to the last, determined either to steer his shattered vessel into port, or to perish gloriously in the faithful discharge of his duty.

ADDENDA.

Challenge your jury with reference to their religion, their business, their association, their localities, their countenances, but above all their tone and manner in answering the preliminary inquiries in regard to their competency to sit as jurors.

After the jury shall have been regularly impannelled and charged with the case, guard them carefully against all out-door prejudice, newspaper publications, and exposure to public influence—at the same time contribute, as far as possible, to their comfort and convenience in the sanctuary of their deliberations.

Recommendations to mercy often induce a conviction of a higher instead of a lower offence; and always imply that *some* of the jury are not fully satisfied with the verdict they render. A prisoner who is *clearly* guilty is entitled to no such recommendation, and if not clearly guilty, he does not require it; but he should either be acquitted, or his offence reduced to that grade of which there was no *reasonable* doubt.

If the case is to turn upon the question between murder in the *first* and *second* degree, impress upon them the injustice of a compromise verdict for the chief offence accompanied by a recommendation to mercy. By proposing such a recommendation the shrewder portion of the jury often induce those who incline to an inferior grade to unite in a verdict for the capital offence. The recommendation in such a case is cruel rather than kind. It is of no possible service, as the court has no power to exercise mercy on such a conviction. Juries are thus deluded into a compromise of conscience and a disregard of reasonable doubts, which should incline them, if not to an acquittal, to a conviction of an inferior crime. The jury should exercise their *own* mercy in weighing the evidence of the case, and a want of unanimity should always lead to a more careful and minute examination of their respective views. Compromises have always been dangerous, from the time of the compromise between Mark Antony, Octavius Cæsar, and Lepidus, which led to the death of some of the noblest citizens of Rome.

In excepting to the opinion of the Court upon questions of evidence, be careful to have the question reduced to writing, the decision and the exception noted and signed by the judge. A life was once nearly lost by these matters not having been strictly attended to. Our most valuable knowledge sometimes springs from having fallen into dangerous errors. Habit should strengthen wisdom. Adopt, therefore, an inflexible rule and never waive its application. Remember a writ of error is of no use, nor will an allocatur even be granted, unless the error be explicitly presented upon the judge's notes.

If the charge be against you, except to it, but *not* in the presence of the jury; and to make matters "doubly sure," as judges do not often write their entire charges, a phonographer should be employed to furnish a literal copy and thereby prevent future difficulty, should ulterior proceedings become necessary.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.[1]

Attorney—Claim for Services—Statute of Limitations.—The statute of limitations does not begin to run against any part of the claim of an attorney at law for services rendered and moneys paid in conducting a suit to its termination, under a general employment, until the final entry of judgment therein: *Eliot* vs. *Lawton.*

Contract—Lien—Vessel.—Under a contract to build three light vessels for the United States, and to deliver them completed within a fixed time, and to be governed during the progress of the building of them by the directions of an agent of the United States, and to perform the work to his satisfaction, for a price to be paid after their completion, with a provision that the United States may at any time declare the contract null, no title to the vessels passes to the United States until their completion

[1] From Charles Allen, Esq., Reporter, to appear in Vol. VII. of his Reports. The abstracts in our June number, erroneously stated as from Vol. VI., will also appear in Vol. VII.